89- 1479

Supreme Court, U.S.
FILED
APR 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

KEITH SMITH,
Petitioner
v.

BALTIMORE CITY POLICE DEPARTMENT,
and
COMMISSIONER, BALTIMORE CITY POLICE
DEPARTMENT,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE
COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI

NEAL M. JANEY,
CITY SOLICITOR

OTHO M. THOMPSON,
ASSOCIATE CITY SOLICITOR,
Department of Law
101 City Hall
Baltimore, Maryland 21202,
(301) 396-3659,
Attorneys for Respondents.

BEST AVAILABLE COPY

COUNTERSTATMENT OF QUESTION PRESENTED

May an administrative agency, pursuant to its internal investigation, require an officer to give a statement that can be admitted into evidence against the officer at the agency's disciplinary hearing?

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

OPINION BELOW.....2

COUNTERSTATEMENT OF THE CASE.....2

REASONS FOR DENYING THE WRIT.....3

I. PETITIONER SEEKS TO IMPROPERLY ASSERT NEW ISSUES WHICH WERE NOT RAISED BELOW.....3

II. THERE IS NO SUBSTANTIAL FEDERAL QUESTION.....7

III. THE COURT SHOULD DENY THE PETITION BECAUSE THERE EXIST INDEPENDENT AND ADEQUATE STATE GROUNDS TO UPHOLD THE LOWER COURT'S DECISION.....13

CONCLUSION.....16

TABLE OF AUTHORITIES

Cases:

Caldwell v. Mississippi, 472 U.S. 320 (1985).....15

Carlson v. Green, 446 U.S. 14 (1980).....6

Gardner v. Broderick, 392 U.S. 273 (1968).....10,12

Garrity v. New Jersey, 385 U.S. 493 (1967).....9,10

Lefkowitz v. Cunningham, 431 U.S. 801 (1977).....12

Singleton v. Wulff, 428 U.S. 106 (1976)....6

Uniformed Sanitation Men's Association v. Commissioner of Sanitation, 392 U.S. 280 (1968) on remand 426 F.2d 619(1970).....11

Youakim v. Miller, 425 U.S. 231 (1976).....6

Statute:

Md. Ann. Code Art. 27 Section 728(7)(ii)..9,12

APPENDIX

Appendix A - Excerpt of Statement of Keith Smith.....1a

Appendix B - Md. Ann. Code Art. 27 Section 728(7)(ii).....1b

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

KEITH SMITH,

Petitioner,

v.

BALTIMORE CITY POLICE DEPARTMENT
and
COMMISSIONER, BALTIMORE CITY POLICE
DEPARTMENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE
COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Baltimore City Police Department's Trial Board is reproduced in Petitioner's Appendix 9a. The affirming decision of the Circuit Court for Baltimore City is reproduced in Petitioner's Appendix 8a. The affiriming decision of the Maryland Court of Special Appeals is reproduced in Petitioner's Appendix 2a. The Maryland Court of Appeals' decision denying Certiorari is reproduced in Petitioner's Appendix 1a.

COUNTERSTATEMENT OF THE CASE

On May 6, 1983 the Baltimore City Police Department received a complaint alleging misconduct on the part of the Petitioner who was accused of inter alia, using a controlled dangerous substance (marijuana) and engaging

in sexual misconduct with two teenage girls on May 3, 1983. On May 6, 1983, the Petitioner, in conjunction with the investigation that ensued, received and complied with an order to submit to a urinalysis test the results of which were admissible at an administrative hearing but not in any criminal proceeding.

On June 6, 1983 Petitioner was requested to give a statement to the Internal Investigation Division regarding the allegations made against him. At the time the Petitioner's statement was taken, he and his counsel Herbert Weiner were advised and in receipt of a letter from the Baltimore City States' Attorney stating that the States' Attorney declined to proceed criminally against the Petitioner. (See Resp. App. page

26a - Exhibit List, Department No. 3, also Res. Pet. 4a).

The Petitioner was administratively charged with 1) using a controlled dangerous substance; 2) misrepresenting material facts/false statement to the Internal Investigation Division; and 3) misconduct.

On April 8 and 9, 1987, the Police Department held an administrative hearing in which the results of the urinalysis and the Petitioner's statement were admitted into evidence along with the eyewitness testimony of Lisa Scott who said that she saw the Petitioner smoke marijuana on May 3, 1983. (Pet. App. 17a). The hearing board found the Petitioner guilty of misconduct and using a controlled dangerous substance. On April 21,

1987 the Police Commissioner issued an order terminating the Petitioner's employment.

The Circuit Court for Baltimore City affirmed the decision of the trial board on September 9, 1988.

On September 14, 1989, the Maryland Court of Special Appeals affirmed the decision of the Circuit Court. On December 20, 1989, the Maryland Court of Appeals denied Certiorari.

REASONS FOR DENYING THE WRIT

I.

PETITIONER SEEKS TO IMPROPERLY ASSERT NEW ISSUES WHICH WERE NOT RAISED BELOW.

In his appeal of the Police Department's decision to the Circuit Court for Baltimore City and subsequently, Maryland Court of Special Appeals, the Petitioner objected to

the introduction of his urinalysis exam on the grounds that the urinalysis exam and procedures in administering the exam were unreliable. (Pet. App. 3a - Opinion). Now for the first time, the Petitioner asserts that the administration of the exam itself violated his constitutional rights.

Ordinarily, this Court will not decide questions that were not raised or resolved in the lower courts. Youakim v. Miller, 425 U.S. 231 (1976), Singleton v. Wulff, 428 U.S. 106 (1976). The specific issues raised as to the constitutionality of urinalysis are unclear and not squarely presented in this Petition. Since the issues are not squarely presented this Court should deny the Writ. Carlson v. Green, 446 U.S. 14 (1980).

The Petitioner has suddenly alleged a vague constitutional claim based on the admissibility of a urinalysis exam; however he never asserted, argued or presented this claim below. This Court should not entertain a new claim without good cause.

ARGUMENT

II.

THERE IS NO SUBSTANTIAL FEDERAL QUESTION.

The issue that the Petitioner raises is a matter of well settled, established federal law. The Petitioner presents no new important question for this Court to decide.

The Petitioner's basis for this appeal is that statements given to the Internal Investigation Division could have been but were not used against him in a criminal

proceeding. Aside from the fact that any statements could not have been used against him for reasons that will be expanded upon, the Petitioner asks this Court to hear the case based on a hypothetical situation. The Petitioner asks this Court to hear a case based upon a factual scenario that did not occur. The Petitioner does not assert that the Respondent or anyone else attempted to use his statement in a criminal proceeding; rather, he posits that if the statement had been introduced in a criminal proceeding, he would have been harmed.

However, prior to taking his statement, the Police Department advised the Petitioner that the States' Attorney had declined to proceed with criminal charges. (Resp. Appendix

A). Moreover, the Petitioner has the protection of state law which prohibits the use of any compelled statements in any criminal proceeding against a law enforcement officer. Md. Ann. Code Art. 27 Section 728(7)(ii).[1]

The Petitioner further argues that a compelled statement given by a police officer pursuant to an internal agency investigation is, in and of itself, illegal and not admissible in a subsequent agency disciplinary hearing.

Petitioner has failed to cite any legal authority for the proposition that a law enforcement agency may not require statements

---

[1] A copy of this section - MD Ann. Code Article 27, Section 728(7)(ii) is attached as Appendix B.

from its officers when conducting an administrative investigation. In Garrity v. State of New Jersey, 383 U.S. 493, 500 this court stated that, "[t]he protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office." Unlike Garrity, in this case, there was no subsequent criminal prosecution nor was there ever a threat of such occurring.

In Gardner v. Broderick, 392 U.S. 273 (1968), a police officer was terminated for failure to waive his right to remain silent and his immunity from prosecution. However, this Court stated that the officer could have been required to "answer questions

specifically, directly, and narrowly relating to the performance of this official duties." Id. at 278; Uniformed Sanitation Men Association v. Commissioner of Sanitation, 392 U.S. 280 (1968).

On remand in Uniformed Sanitation Men's Association v. Commissioner of Sanitation, 426 F. 2nd 619 (1970), Judge Friendly stated at 627:

> "The proceeding here involved no attempt to coerce relinquishment of constitutional rights, because public employees do not have an absolute constitutional right to refuse to account for their official actions and still keep their jobs;

> their right conferred by the Fifth Amendment itself, as construed in Garrity, is simply that neither what they say under such commission nor its fruits can be used against them in a subsequent prosecution."

In Garrity and Uniformed Sanitation Men, the employee was not protected by a statute such as Md.Ann. Code Art. 27 Section 728(7)(ii) which prohibits the discovery or admissibility of compelled statements in criminal proceedings against a police officer.

The principles enunciated in Gardner and Uniformed Sanitation Men were reiterated in Lefkowitz v. Cunningham, 431 U.S. 801(1977). The Court quoting Gardner stated that, "[p]ublic employees may constitutionally be

discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity." Id. at 806.

The Petitioner was never required to waive any constitutional rights.

ARGUMENT

III.

THE COURT SHOULD DENY THE PETITION BECAUSE THERE EXIST INDEPENDENT AND ADEQUATE STATE GROUNDS TO UPHOLD THE DECISION BELOW.

This Court should deny the Petition because, in addition to Petitioner's statement which is the focus of this constitutional challenge, there existed other substantial

evidence to support the lower courts decision upholding the findings by the Police Department trial board. This evidence included the urinalysis test findings and eyewitness testimony of Lisa Scott who saw the Petitioner smoke marijuana.

The Maryland Court of Special Appeals examined the procedures and results of a urinalysis test administered to the Petitioner and determined that there was no error in the admission of the urine analysis. (Pet. App. 5a). As previously stated, the Petitioner did not raise the issue of whether the urine analysis was illegally obtained in any of the proceedings below.

Even without the Petitioner's statement, there was other evidence (i.e. the urine

analysis and eyewitness testimony) which would have satisfied the substantial evidence test applied by the lower courts in their review of the decision. (Pet. App. 2a).

Thus the lower court based its decision on other adequate and independent state grounds rather than solely upon the Petitioner's statement. If a state court decision indicates clearly that it is alternatively based on bona fide, separate adequate and independent grounds the Supreme Court will not undertake to review its decision. Caldwell v. Mississippi, 472 U.S. 320. Since the lower court based its decision on adequate and independent state grounds this Court should deny the Petition.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Neal M. Janey

NEAL M. JANEY
City Solicitor

Otho M. Thompson /by MBH

OTHO M. THOMPSON
Associate City Solicitor
Department of Law
101 City Hall
Baltimore, Maryland 21202
(301) 396-3659

Attorneys for Respondents.

APPENDIX A

EXCERPT OF STATEMENT GIVEN BY KEITH SMITH TO THE INTERNAL INVESTIGATION DIVISION

A. (Attorney, Mr. Herbert Weiner). By giving a statement, I want to record to reflect that Officer Smith is not waving any of his rights under the Law Enforcement Officer's Bill of Rights, or under the United States Constitution, or, the Federal Constitution. I further have been shown a copy of a letter from the State's Attorney's Office of Baltimore city, which indicates that, that office at this time, does not have any intention to proceed criminally with regard to the allegations set forth in this case, is that correct?

APPENDIX B

LAW ENFORCEMENT OFFICERS BILL OF RIGHTS

Article 27, Section 728 (7)(i)(ii)

(7) (i) The law-enforcement officer under interrogation may not be threatened with transfer, dismissal, or disciplinary action.

(ii) This subtitle does not prevent any law-enforcement agency from requiring a law-enforcement officer under investigation to submit to blood alcohol test, blood, breath, or urine tests for controlled dangerous substances, polygraph examinations, or interrogations which specifically relate to the subject matter of the investigation. This subtitle does not prevent a law-enforcement agency from commencing any action which may lead to a punitive measure as a result of a

law-enforcement officer's refusal to submit to a blood alcohol test, blood, breath, or urine tests for controlled dangerous substances, polygraph examination, or interrogation, after having been ordered to do so by the law-enforcement agency. The results of any blood alcohol test, blood, breath, or urine test for controlled dangerous substances, polygraph examination, or interrogation, as may be required by the law-enforcement agency under this subparagraph are not admissible or discoverable in any criminal proceedings against the law-enforcement officer when the law-enforcement officer has been ordered to submit thereto. The results of a polygraph examination may not be used as evidence in any administrative hearing when the law-

enforcement officer has been ordered to submit to a polygraph examination by the law-enforcement agency unless the agency and the law-enforcement officer agree to the admission of the results at the administrative hearing.